

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BARRY E. OWENS,)	
)	
Plaintiff)	
)	
v.)	Civil No. 99-0155-B
)	
TOWN OF JACKMAN,)	
)	
Defendant)	

RECOMMENDED DECISION

Plaintiff, the former Public Works Director for Defendant Town of Jackman, filed this action in June, 1999, asserting claims under the due process clause and state law. Specifically, he alleged that his position as Public Works Director was improperly eliminated, and that when town officials learned of their error, he was thereafter refused rehire on the basis of fabricated complaints placed in his personnel file.

On August 20, 1999, Defendant moved to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The Motion interpreted Plaintiff's claims in counts I and II to allege a violation of the procedural protections of the due process clause. Plaintiff then indicated in his response to the Motion that he intended to assert only a claim for a substantive due process violation. The Court, on October 4, 1999,

issued an Order dismissing counts I and II of Plaintiff's Complaint to the extent it purported to state a claim for a violation of procedural due process rights, construing Defendant's reply as a Motion to Dismiss the Substantive Due Process Claim, and permitting Plaintiff leave to file an objection to that Motion to Dismiss. The Court also indicated it would address Defendant's arguments with respect to Plaintiff's state claims if necessary following resolution of the federal question.

The parties have now filed their response and reply briefs directed to the Motion to Dismiss the Substantive Due Process claim. The Court has reviewed the arguments presented in those pleadings, and is satisfied that the Motion to Dismiss Plaintiff's claims in counts I and II of the Complaint should be granted.

Plaintiff asserts that his Complaint properly sets forth a violation of substantive due process protection under both of the two recognized theories. The first theory requires Plaintiff prove a violation of a property interest protected by substantive due process. *Pittsley v. Warish*, 927 F.2d 3, 6 (1st Cir. 1991) (citations omitted). The second, alternative, method requires a showing of behavior that “‘shocks the conscious’ or ‘offends the community’s sense of fair play and decency.’” *Id.* (quoting *Rochin v. California*, 342 U.S. 165, 172, 173 (1952)).

As to the first theory, Defendant correctly argues that Plaintiff's property interest in his continued employment with Defendant does not rise to the level

required for substantive due process protection. “Not every property interest is entitled to the protection of substantive due process. While a property interest created under state law will receive the protections of procedural due process, only those property rights derived under the Constitution receive the protections of substantive due process.” *Coyne v. City of Somerville*, 770 F. Supp. 740, 746 (D. Mass. 1991) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). In this case, Plaintiff relies on a provision in the Town code restricting the hiring, firing and discipline of the Public Works Director to the Town Manager as the origin for his federally-protected interest in not being fired by the Board of Selectmen. Pltf. Mem. at 2. Like the plaintiff in *Coyne*, Plaintiff’s interest is, at best, “a right weaved from the cloth of state law.” *Coyne*, 770 F. Supp. at 747. It simply is not an interest comparable to procreation, marriage or family life. *Id.*, (citing *Harrah Ind. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam)).

The analysis of substantive due process under the second, “conscious-shocking,” theory is not quite so simple. Under this theory, the conduct of which Plaintiff complains “must ‘do more than offend some fastidious squeamishness or private sentimentalism.’” *Pittsley*, 927 F.2d at 7 (quoting *Rochin*, 342 U.S. at 172). It must offend even “‘hardened sensibilities.’” *Id.* at 6 (quoting *Rochin*, 342 U.S. at 172).

The First Circuit Court of Appeals has never found “conscious-shocking” behavior in the absence of ““extreme or intrusive physical contact.”” *Brown v. Hot, Sexy and Safer Prod.*, 68 F.3d 525, 531 (citations omitted). The court has noted that the “threshold for alleging such claims is high.” *Id.* at 532. Indeed, even a “despicable” and “wrongful” misuse of authority allegedly resulting in fear and trauma to small children has been found by the court to be an insufficient basis upon which to ground a claim of this type. *Pittsley*, 927 F.2d at 7; *see also*, *Souza v. Pina*, 53 F.3d 423, 424-27 (1st Cir. 1995) (behavior of prosecutor in publically linking plaintiff’s suicidal son to serial murders not “conscious-shocking”). The conduct alleged in this Complaint, that Defendant terminated Plaintiff’s employment despite having been advised that such a move was illegal, and thereafter refused to rehire Plaintiff on the basis of allegedly fabricated complaints, clearly does not rise to the level necessary to maintain this claim.

Conclusion

Accordingly, I hereby recommend Defendant’s Motion to Dismiss Plaintiff’s Claims in Counts I and II of the Complaint (docket no. 5) be GRANTED, and that Plaintiff’s state law claims be DISMISSED for lack of subject matter jurisdiction. *Astrowsky v. First Portland Mort. Corp.*, 887 F. Supp. 332, 337 (D. Me. 1995).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on: November 18, 1999